85-345 (1)

NO. 84-1399

Supreme Court, U.S.
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CLERK

IN THE SUPREME COURT OF THE UNITED STATES

Term, 1985

Ernest Allen,

Petitioner

v.

City of Kinloch,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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27 pp

QUESTIONS PRESENTED

When a Police Officer of a municipality, following City established procedures and without a search warrant, and without a pre-deprivation hearing, takes and removes motor vehicles of a citizen from his home, such removal not being first time, is the citizen barred from suing the municipality under 28 U.S.C. 1983 when he has a State remedy by reason of its replevin laws (post-deprivation hearing), which returns the property and affords him limited damages for its return?

INDEX

	PAGE
Opinions Below.	iv
Jurisdiction	vi
Questions Presented	i
Constitutional Provision, Statutes Involved	vi
Statement	1
a. United States District Court Proceedings	3
b. Eighth Circuit Proceedings	3
Reasons for Granting Writ . . .	4
Conclusion	9
Appendix A-Opinion Below in District	11
Appendix B-Opinion Below in Eighth Circuit	12
Appendix C-Statute 28 U.S.C. 1983	20
Cases:	
Parratt v. Taylor 101 S. Ct. 1908 (1981)	
Logan v. Zimmerman Brush Co. 102 S. Ct. 1148 (1982)	
Bell v. Burson 402 U.S. 535,91 S. Ct. 1586 (1971)	
Fuentes v. Shevia 407 U.S. 67, 92 S. Ct. 1983 (1972)	

PAGE

United States Constitutional Provisions

Fourth Amendment vi

Fourteenth Amendment. vi

Statutes

28 U.S.C. 1983 20

IN THE SUPREME COURT OF
THE UNITED STATES

ERNEST ALLEN

Petitioner,

v.

CITY OF KINLOCH

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF
APPEAL FOR THE EIGHTH CIRCUIT

ERNEST ALLEN, by and through his attorney, Louis S. Czech, petitions herein for a Writ of Certiorari to review the Decision of the Court of Appeals of the State of Missouri, which reversed a jury decision of the Eastern District of Missouri, United States District Court.

OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals has not formalized

its opinion. Its opinion and judgment are reprinted in the Appendix B. hereto on page 12 .

Ernest Allen v. City of Kinloch, ____F(2)_____ (No. 84-1399 EM) 8th Cir. filed May 31, 1985.

JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was entered on the 31st day of May, 1985, a timely petition for rehearing was denied. The jurisdiction is invoked under 25 U.S. Section 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment to the United States Constitution. Search and Seizures

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment to the United States Constitution: Section 1. Citizenship rights not to be abridged by states.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On July 16, 1983, the plaintiff-owned occupied as his home certain real estate in the City of Kinloch, St. Louis County, Missouri. He and his family had occupied this land since approximately 1923. He was in the trucking business as was his father before him. On this day in July the City of Kinloch Police were taking and removing three of his trucks that were parked on his real estate. The Police of the City of Kinloch had previously taken motor vehicles from his property. After the taking and removing of his trucks on July 16, 1983, the Police came back several weeks later to take additional vehicles, but the plaintiff objected and they did not remove any vehicles at that time.

Such removal and taking was done

without a warrant or other legal process. The trucks were kept and retained by the City until the plaintiff filed his suit against the City under 28 U.S.C. Section 1983 for damages.

At the time of taking the plaintiff arrived home and objected to the taking. He was arrested, handcuffed, and taken to the Police station, but released after being held for several hours without any charges being filed.

He received four traffic tickets from the Police--two for failure to have a City license--one for failure to have a State inspection--one for improper registration.

The City had established procedures to order motor vehicles to be removed from one's property without a pre-deprivation hearing. If the motor vehicles were not removed the Police would remove

the items without a warrant or other legal process.

The matter was submitted to a jury in the District Court which returned a verdict for plaintiff for $3,000.00.

The City appealed the jury verdict to the Eighth Circuit, which reversed the jury verdict. The Appeals Court stated in reversing the jury verdict that:

> Parrott v. Taylor 451 U.S. 527 (1980), and
>
> Hudson v. Palmer 104 S. Ct. 3194 (1984) decisions hold that where a random and unauthorized act by a State employee results in a tortious taking of private property, due process is satisfied if State tort law provides a meaningful post-deprivation remedy.

The Appellate Court further stated that the Missouri Court provided an adequate remedy by way of replevin.

REASONS FOR GRANTING THE WRIT

The Court should grant the petition in order to settle the question as to whether a State afforded remedy of replevin (post-deprivation) is an adequate protection for violation of a person's Constitutional Fourth Amendment and Fourteenth Amendment rights.

In the case at bar plaintiff was the owner of a truck which was parked on his property and which he used in his livelihood to support himself and family. The trucks were taken off his property without a warrant or other legal process. No hearing, prior or after the vehicles were taken was provided to him. The taking of his motor vehicles is

equally important as the taking of one's driver's license. Bell v. Burson 402 U.S. 535,91 S. Ct. 1586 (1971). It is equal to what this Court condemned in Fuentes v. Shevin 407 U.S. 67, 92 S. Ct. 1983 (1972) where a Florida replevin statute was struck down for allowing writs to be secured in ex parte proceedings. No pre-hearing was afforded in these cases. In Missouri the replevin law only allows relief after the fact and not before.

This Court has recognized post-deprivation remedies as providing and satisfying the due Process clause. Such cases involving post-deprivation remedies, however, seem to recognize that post-deprivations are valid if there is a necessity of quick action or the impracticality of providing any meaningful pre-deprivation process. In this

case, there was no necessity of quick action nor was it impractical to provide a pre-deprivation hearing. The motor vehicles were on private property and as ticketed, it is alleged they were in violation of license requirements which requirements are not required for vehicles that are on private property only when they are driven on the public streets.

In this case, more than property rights are involved--right to earn a livelihood--right to be secured in one's home.

The Eighth Circuit stated that a post-deprivation hearing by way of a replevin suit provided an adequate state remedy. This would require an expenditure of funds by plaintiff.

It is suggested to the Court that the Eighth Circuit opinion is in error in that there was no immediacy to protect

the public or traffic flow continuity and therefore a pre-deprivation hearing should have been given.

This decision, if it is allowed to stand, will allow the Police in Kinloch to go to one's property and take and remove the citizen's property no matter what it might be, all in violation of the Fourth and the Fourteenth Amendment. The decision of the Eighth Circuit approves and establishes a procedure that is likened to a Police State. This action by the Kinloch Police was not a random act but was a continuing procedure utilized by the City of Kinloch. These procedures are unlawful, intentional and illegal, and not just negligence and an adequate hearing preceding the deprivation could and should be established before a person's home is searched and property seized therefrom. Such State remedy

(replevin) would not keep the plaintiff from discriminatory treatment and does not provide him with an adequate remedy. Such action by the Police could continue on and on and plaintiff's only relief would be a replevin suit and such post-deprivation hearing is not appropriate in light of the city's action.

If a pre-deprivation hearing is not required, the police are given an unbridled authority to come on a citizen's property and remove whatever they want subject only to post-deprivation hearing by way of replevin. Such relief would not be a deterent to such raids by the Police. The Police would be encouraged to search and seize if a replevin suit is the only remedy a citizen has.

CONCLUSION

For the reasons outlined above, Petitioner respectfully requests that this Honorable Court grant his Petition for Writ of Certiorari or in the alternative, that the opinion and Order of the Court of Appeals of the Eighth Circuit, State of Missouri, be summarily reversed; or such other and further relief as to this Honorable Court may appear appropriate.

RESPECTFULLY SUBMITTED this 27 day of August, 1985.

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(314) 863-4020

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

NO. 83-1950 C(5)

ERNEST ALLEN,

Plaintiff
Appellant

v.

CITY OF KINLOCH

Defendant
Appellee

We the jury find in favor of Ernest Allen. We the jury assess the damages of plaintiff Ernest Allen as follows. For actual damages $3,000.00.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1399

Ernest Allen,	*	
	*	
Appellee,	*	Appeal from the
	*	United States District
v.	*	Court for the Eastern
	*	District of Missouri.
City of Kinloch,	*	
	*	
Appellant.	*	

Submitted: November 13, 1984

Filed: May 31, 1985

Before ARNOLD, Circuit Judge, HENLEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

HENLEY, Senior Circuit Judge.

The City of Kinloch appeals from the district court's entry of judgment on a

jury verdict awarding Ernest Allen $3,000.00 in compensatory damages on a civil rights claim he had brought against the city under 42 U.S.C. § 1983. For reasons to be stated, we reverse.

Allen's claim, which alleged violation of his procedural due process rights, stemmed from an incident in which Kinloch police had had three of his trucks towed off property he owned or occupied. The trucks were towed on July 16, 1983, and were held by Ed Erp's Automotive Center, apparently on instructions from the police department, until January, 1984. According to Allen, he received no hearing or pre-towing notice. Allen further alleged that Kinloch police had once without warning towed several of his son's vehicles from the same premises, and had never

returned them. Allen testified that on another occasion police had threatened to tow other of his trucks which he had parked on the property. Testimony elicited by Allen's attorney indicated that tickets and twenty-four hour removal notices completed by the police in connection with the towings had cited non-existent ordinances and had referred to different trucks than those ultimately towed.

It is important to an understanding of the issues before us on appeal to clarify the nature of the claim Allen presented at trial. Allen presented little or no evidence regarding procedures the City normally afforded owners of towed vehicles; nor did he present rebuttal evidence when City officials testified that the City provided vehicle owners

hearings in towing situations.[1] Instead, Allen's evidence focused on how he and other members of his family had been treated by police, and whether the trucks had been parked on his property or on the City's property. In short, as the jury instructions reveal, Allen's claim, rather than being an attack on the facial validity of any established procedures or policies Kinloch might have had, was instead that police had abused their authority by arbitrarily seizing his trucks.

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[1]The mayor of Kinloch testified that hearings were afforded in towing situations. Several tickets which Allen admitted having received on the day of the towings were admitted into evidence; on them, the notation "7-26-83" appears in blocks captioned "court date." There is no indication that Allen appeared or sought to appear on July 26, 1983 or any other date.

From a reading of the jury instructions, we assume the jury concluded that the towings had been improper, and that police had intentionally or knowingly exceeded their authority in arranging for the trucks to be towed. Nevertheless, "[n]othing in the [Fourteenth] Amendment protects against all deprivations of life, liberty, or property by the State. The Fourteenth Amendment protects only against deprivations 'without due process of law.'" Parratt v. Taylor, 451 U.S. 527, 537 (1981), quoting Baker v. McCollan, 443 U.S. 137, 145 (1979). The constitutional issue here is what process was due Allen. It appears settled that municipalities authorizing towing of illegally parked cars are not required by the Constitution to establish pre-deprivation notice and hearing procedures. Breath v. Cronvich, 729 F.2d 1006, 1010 (5th Cir.), cert. denied, 105 S. Ct. 332 (1984); Sutton

v. City of Milwaukee, 672 F.2d 644, 646 (7th Cir. 1982). Further; given Allen's essential claim here that the police department ordered the towings as a deliberate or reckless abuse of authority, the City could hardly be expected to have procedures in place which would automatically afford Allen a remedy. See Parratt v. Taylor, 451 U.S. 527, 541 (1980); Hudson v. Palmer, 104 S. Ct. 3194, 3203 (1984). Due process does require that Allen have had, at a meaningful time and in a meaningful manner, an opportunity to challenge the seizure of his property. Mathews v. Eldridge, 424 U.S. 319, 333 (1976). In this connection, however, the Supreme Court has held that, where a random and unauthorized act by a state employee results in a tortious taking of private property, due process is satisfied if state tort law provides a meaningful

post-deprivation remedy. Parratt v. Taylor, 451 U.S. 527 (1980); Hudson v. Palmer, 104 S. Ct. 3194 (1984). See also Hubenthal v. County of Winoma, 751 F.2d 243 (8th Cir. 1984).

In Missouri, a person claiming the right to possession of personal property wrongfully detained by another may bring an action in replevin. Mo. R. Civ. P. 99.01 (1983). If the court or jury finds the plaintiff in such an action is entitled to possession of the property, a judgment issues for the return of the property or the value of the property (at the prevailing party's option), and for damages assessed for the taking, detention or injury. Mo. R. Civ. P. 99.12. We see no reason to suppose Allen could not have obtained adequate relief for the taking of his trucks in a replevin action. Cf. Hudson v. Palmer,

104 S. Ct. at 3204 (1984) (fact that § 1983 plaintiff might recover less in state tort action does not mean tort remedy is inadequate). Accordingly, we must hold that Allen failed to establish any violation of his constitutional rights.

In view of our disposition of this case, a "motion to strike" which the City filed following oral argument on this case is dismissed as moot. The judgment of the district court is reversed and the cause is remanded for entry of appropriate judgment.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

§ 1983 Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

CERTIFICATE OF SERVICE

I, Louis S. Czech, counsel of record for Ernest Allen, petitioner herein, hereby certify that on 27 day of August, 1985, pursuant to Rule 28, Rules of the Supreme Court, I served three copies of the foregoing Petition for a Writ of Certiorari to the Eighth Circuit Court of Appeals on each of the parties herein, as follows:

On the City of Kinloch, respondent herein, by depositing such copies in the United States Post Office, with first class postage prepaid, properly addressed to the post office address of Bussey & Jordan, the above-named respondent's counsel of record, at 721 Olive Street, Suite 515, St. Louis, Missouri 63101.

ALL PARTIES REQUIRED TO BE SERVED HAVE BEEN SERVED.

Dated this 27 day of August, 1985.

LOUIS S. CZECH
Counsel for Petitioner